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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/727,281	12/03/2003	Edward Dewey Smith III	7682MC2	6919

27752 7590 04/06/2005

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EXAMINER

BEFUMO, JENNA LEIGH

ART UNIT	PAPER NUMBER
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1771

DATE MAILED: 04/06/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

10/727,281

Applicant(s)

SMITH ET AL.

Examiner

Jenna-Leigh Befumo

Art Unit

1771

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 14 January 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-25,27-31,33 and 35-58 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-25,27-31,33 and 35-58 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_.

## **DETAILED ACTION**

### ***Response to Amendment***

1. The amendment filed on January 14, 2005 has been entered. Claims 26, 32, and 34 have been cancelled. Therefore, the pending claims are 1 – 25, 27 – 31, 33, and 35 – 58.
2. The statutory double patenting rejection over US Application No. 10/677,868 is withdrawn since the copending application has been abandoned.

### ***Election/Restrictions***

3. Applicant's election without traverse of Group I, claims 1 – 25, 27 – 31, 33, and 35 – 58 in the reply filed on January 14, 2005 is acknowledged.

### ***Double Patenting***

4. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

5. Claims 1, 25, 27, 33, and 58 stand rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 14 of U.S. Patent No. 6,153,208 for the reasons of record. The applicant argues that the scopes of the claims in US 6,153,208 do not overlap with the scope of the present claims because the claims fail to disclose a batting layer and adding a lathering surfactant or therapeutic benefit component in a range of

Art Unit: 1771

10 to 1000% (response, page 12). First, with respect to the added components, the amounts of surfactant and benefit component recited in US 6,153,208 overlap with the Applicants presently claimed ranges. The prior art does not need to teach the entire range, but just a portion of the claimed range, to overlap in scope with the present claims.

Second, US 6,153,208 defines the first and second layers of the water insoluble substrate by the properties of said layers. Since the disclosure teaches what materials are used to produce the claimed properties, then the first and second layers are defined by the materials used in the disclosure. Specifically, the disclosure teaches that the first layer can be made from paper webs, woven materials, nonwoven materials, foams, battings, and the like (column 11, lines 63 – 67). The second layer can be made from woven materials, nonwoven materials, foams, battings, and the like, as well as using nonwoven fabrics made with more than one type of fiber (column 14, lines 48 – 67). Hence, these materials can be read into the claims because the properties claimed are defined by the specification. Thus, the scope of claim 14 does include battings and composite materials. Further, as noted in the previous Office action, the term battings reads on any material having some degree of loft. The composite material can either be a multi-layer fabric which includes a nonwoven layer or a nonwoven batting made from more than one type of fiber. Thus, these limitations are claimed by US 6,153,208 and the claims of the present invention overlap in scope with the scope of claim 14. Thus, the rejection is maintained.

6. Claims 1 – 5, 9 – 13, 16 – 18, 21 – 25, 27 – 31, 33, 35 – 37, 39 – 48, and 54 – 58 stand rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1 – 7, 9, 10, 12, 14, and 16 – 19 of U.S. Patent No. 6,267,975 for the reasons of record. The applicant argues that US 6,267,975 does not teach a batting layer

Art Unit: 1771

(response, pages 13 – 14). In US 6,267,975, the materials used to make the substrate are defined by a loft-soft ratio property and not by the actual structure. Thus, one of skill in the art would need to look to the disclosure to how the property is defined and what materials meet the claimed limitations. The disclosure teaches that either the first or second layer can be made from cellulosic nonwovens, non-lofty nonwovens, sponges, formed films, battings, and combinations thereof (column 5, lines 5 – 15). Further, the disclosure teaches that various fiber materials including blends of the various materials can be used to produce the first or second layers (column 6, lines 5 – 30). Thus, the layers recited in the claims would include batting materials combined with additional layers or batting materials made from various fibers. This meets the limitations of the batting layer as claimed in the present invention. Therefore, the scope of US 6,267,975 overlap with the scope of the present claims and the rejection is maintained.

***Claim Rejections - 35 USC § 112***

7. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

8. Claims 5 – 8, 11, and 43 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

9. The term “batting layer composite material” in claim 5 is used by the claim to mean a material formed from various substrates including foam layers, polymeric nets, and films, while the accepted meaning is “a soft, bulky assembly of fibers.” Claim 7 is similarly rejected. Claims 6 and 8 are rejected due to their dependency on claim 5 and 7. The applicant argued that the examiner did not provide sufficient evidence to show that the term was being used contrary to

Art Unit: 1771

it's meaning in the art and would not be understood by one of ordinary skill in the art based on the specification (response, 14 – 15). However, the accepted meaning of the term was provided as well as the reasoning why the applicant's definition was contrary. As further evidence, the definition disclosed in the *Complete Textile Glossary* (Celanese Acetate) is provided with the present action. The definition reinforces the position that a batting material must be made up of fibers combined together to form a bulky material. Hence, foams, polymeric nets, and films do not qualify as battings and describing them as such is contrary to the known meaning. Further, the specification does not state that the batting material can be made from foam, nets, or films. The specification instead teaches that the batting is a lofty material made from fibers (page 5 – 6). While the disclosure states that nets, films, and foams can be bonded to the batting layer, these materials cannot be used as the batting layer.

10. Claims 11 and 43 are rejected since the applicant recites that the nonwoven material can be made from films, foams, sponges and scrims. The applicant argued that the examiner did not provide sufficient evidence to show that the term was being used contrary to it's meaning in the art (response, 14 – 15). The applicant argues that there is no evidence to show that one with ordinary skill in the art would not understand the claim language in view of the specification. The specification does not explicitly define the term nonwoven to include films, foams, sponges, and scrims. Thus, the term used in the claims would be given it's broadest reasonable interpretation as it is understood in the art. In this case nonwovens do not include non-fibrous materials such as films, foams, and sponges. This definition is supported by the INDA definition referred to in *The Nonwoven Fabrics Handbook* (INDA Association of the Nonwoven Fabrics

Art Unit: 1771

Industry). Thus, one of ordinary skill in the art would not include the materials claimed by the applicant in the nonwoven layer.

***Claim Rejections - 35 USC § 103***

11. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

12. Claims 1, 2, 5 – 25, 27 – 31, 33, 37 – 40, and 43 – 58 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Haq (4,515,703) in view of Hasenoehrl et al. (WO 99/21532 A) for the reasons of record.

13. Claims 3, 4, 41, and 42 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Haq and Hasenoehrl et al. as applied to claims 1 and 25 above, and in further view of Horn (5,302,446) for the reasons of record.

14. Claims 35 and 36 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Haq and Hasenoehrl et al. as applied to claims 1 and 27 above, and in further view of Martin et al. (5,702,992) for the reasons of record.

***Response to Arguments***

15. Applicant's arguments filed January 14, 2005 have been fully considered but they are not persuasive. The applicant argues with respect to all the rejections based on Haq in view of Hasenoehrl et al. that the combination of the references does not establish a *prima facie* case of obviousness because the prior art references do not teach the batting layer, adding the lathering surfactant in a range of 10 to 1000% or adding the therapeutic benefit component in a range of 10 to 1000% (response, pages 15 – 21). With respect to the batting layer, the term was defined as a nonwoven material having some degree of loftiness. Further, the fact that it is a composite

Art Unit: 1771

material requires either that it is made from more than one type of fiber or it has more than one layer. The substrate layers taught by Haq are made from nonwoven fabrics bonded to a perforated film layer. Thus, the substrate is a composite material. Further, the nonwoven fabric would inherently comprise some degree of loftiness. Since Haq discloses two substrate layers are bonded together to produce the final product, the first substrate layers reads on the batting layer and the second substrate layer reads on the nonwoven layer. Thus, this feature is disclosed by Haq.

With respect to the amount of lathering surfactant added to the fabric, Hasenoehrl et al. discloses adding between 0.5 and 12.5%. Since this range overlaps with the claimed range between 10 and 12.5%, the teaching of Hasenoehrl et al. are sufficient to reject the claimed range. Further, the rejection argues it would have been obvious to one of ordinary skill in the art to optimize the amount added to the fabric based on the end use. The applicant did not argue this point by providing any evidence that one of ordinary skill wouldn't choose the claimed range. Thus, this rejection is not overcome by the applicant's arguments due to insufficient evidence to the contrary. Finally, with respect to the amount of therapeutic benefit component added to the fabric, Hasenoehrl et al. discloses that this component can be added in an amount of 0.5 to 99%. This range overlaps with the claimed range. The prior art is not required to teach the entire claimed range. Hence the combination of references is sufficient to teach all the claimed limitations. Therefore, the rejections are maintained.

### ***Conclusion***

16. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).



Art Unit: 1771

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jenna-Leigh Befumo whose telephone number is (571) 272-1472. The examiner can normally be reached on Monday - Friday (8:00 - 5:30).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terrel Morris can be reached on (571) 272-1478. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Jenna-Leigh Befumo  
March 31, 2005



CHERYL A. JUSKA  
PRIMARY EXAMINER

